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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS DELGADO,

Defendant and Appellant.

B293045

(Los Angeles County
Super. Ct. No. BA416608)

APPEAL from an order of the Superior Court of Los Angeles County, Upinder S. Kalra, Judge. Affirmed and remanded with directions.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

This is the third appeal brought by defendant Juan Delgado. In the current appeal, defendant challenges the trial court's imposition of fees and fines totaling \$420 without holding a hearing to determine whether defendant had the ability to pay them. Defendant also argues that the case must be remanded for the trial court to exercise its newly obtained discretion to determine whether to strike a five-year Penal Code section 667.5, subdivision (a)(1) enhancement.¹

We affirm the convictions, which are unchallenged in this appeal. We affirm the imposition of the fine and fees because the alleged error was harmless beyond a reasonable doubt. We conclude that the case must be remanded for the trial court to decide whether to impose or strike the section 667.5, subdivision (a)(1) enhancement.

PROCEDURAL BACKGROUND

Following a jury trial, defendant was convicted of one count of assault with a semiautomatic firearm and one count of being a felon in possession of a firearm. The jury found true gang and personal firearm use allegations as to the assault. The trial court found true the allegation that appellant suffered a prior serious felony conviction within the meaning of the "Three Strikes" law. The trial court sentenced defendant to an aggregate term of 26 years 4 months, which included a five-year term pursuant to section 667, subdivision (a)(1).

Following defendant's first appeal, this court reversed the gang enhancement and remanded the case to the trial court for resentencing. (*People v. Delgado* (Aug. 31, 2016, B261252 [nonpub. opn.] (*Delgado I*)).

¹ Undesignated statutory citations are to the Penal Code.

The trial court resentenced defendant to an aggregate term of 20 years. The sentence included a five-year term pursuant to section 667, subdivision (a)(1).

Defendant appealed from the judgment following his resentencing hearing. In the second appeal, this court remanded the case to the trial court to decide whether to strike the firearm enhancement. (*People v. Delgado* (Feb. 27, 2018, B280909 [nonpub. opn.].) Following remand, the trial court struck the section 12022.5 firearm enhancement for purposes of punishment, reducing the sentence by three years. The trial court did not modify the remainder of the sentence including the following fines and assessments: a \$280 restitution fine (§ 1202.4, subd. (b)); a \$280 parole revocation fine, stayed (§ 1202.45); a \$30 criminal conviction assessment for each count (Gov. Code, § 70373); and a \$40 court operations assessment for each count (§ 1465.8, subd. (a)(1)). Defendant timely appealed from the third judgment.

FACTUAL BACKGROUND

The following factual summary is taken from our opinion in *Delgado I, supra*, B261252. “Approximately 10:00 p.m. on September 23, 2013, Elias Paxtor and Juana Barrera were sitting in Paxtor’s car, parked in the driveway of Barrera’s home near the intersection of Arapahoe and Washington west of downtown Los Angeles. Paxtor, who was sitting in the driver’s seat, had turned off the car’s engine and headlights and had rolled down the driver’s side window.” (*Id.* at pp. 2–3.)

“Appellant and another person rode up to the car on bicycles. Appellant approached the driver’s side window, and his companion went to the passenger side, where Barrera was sitting. Appellant put a gun to Paxtor’s head and asked him if he

belonged to a gang. Paxtor responded that he did not belong to any gang. Still pointing the gun at Paxtor's head, appellant demanded that Paxtor hand over everything in his wallet. As Paxtor started to pull out his wallet, he told appellant he did not have any money. Appellant and the other man then abruptly left, riding away on their bicycles." (*Delgado I, supra*, B261252, at p. 3.)

"The entire interaction lasted 15 to 30 seconds. Angered by the incident, Paxtor began following appellant in his car and called the police. Paxtor followed appellant for about an hour. During this time, he dropped Barrera off at her house and resumed his pursuit of appellant. As he continued to follow appellant, he dialed 911 multiple times and saw appellant apparently commit a similar assault on another man. After appellant had left again, Paxtor spoke to the man, who told Paxtor appellant had demanded money." (*Delgado I, supra*, B261252, at p. 3.)

"Paxtor saw appellant point his gun at someone else in front of a Laundromat. Appellant went inside the Laundromat with his bicycle. Police arrived, arrested appellant in the Laundromat, and recovered a loaded semi-automatic handgun hidden in a laundry basket." (*Delgado I, supra*, B261252, at p. 3.)

Los Angeles Police Officer Kenny Talbert testified as the prosecution's gang expert. "Officer Talbert served in the Olympic Division's gang enforcement unit for four years. During that time, he interacted with appellant at least 15 times, and appellant identified himself as a member of the Playboys in about half of those encounters. . . . The officer identified appellant's Playboys gang tattoos and opined that gang tattoos on the face constitute a claim of gang affiliation, signifying a 'deeper

involvement' in the gang.” (*Delgado I, supra*, B261252, at p. 4.) Officer Talbert conceded that there were no field identification (FI) cards for appellant dated after 2012. “He further recognized that appellant’s association with other Playboys gang members noted on the FI cards was limited to contacts with his own brothers, who were documented Playboys gang members, and one incident in which appellant was associating with Playboys member Jose Gomez on December 27, 2010.” (*Delgado I, supra*, B261252, at p. 5.)

DISCUSSION

In the current appeal, defendant argues that the trial court violated his due process right by imposing \$140 in assessments and a \$280 restitution fine without determining he had the ability to pay the assessments and fine. Defendant also argues that upon remand the trial court should exercise its discretion to determine whether to strike the five-year section 667, subdivision (a) enhancement. Respondent agrees with the latter contention.

A. The Alleged Error in Failing to Hold an Ability to Pay Hearing Was Harmless Beyond a Reasonable Doubt

Defendant argues that the trial court erred in imposing the following fines without holding a hearing on defendant’s ability to pay those fines: a \$280 victim restitution fine, an \$80 court security assessment, and a \$60 criminal conviction assessment. Defendant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

In *Dueñas*, the trial court imposed on the defendant certain assessments and a \$150 restitution fine. The trial court rejected

the defendant's argument that imposition of the assessments and the fine without consideration of her ability to pay them violated her constitutional rights to due process and equal protection. (*Dueñas, supra*, 30 Cal.App.5th at p. 1163.)

The Court of Appeal reversed, holding that “the assessment provisions of Government Code section 70373 and . . . section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair[, and] imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) The imposition of a minimum restitution fine without consideration of the defendant's ability to pay also violated due process. (*Id.* at pp. 1169–1172.) The appellate court reversed the order imposing the assessments and directed the trial court to stay the execution of the restitution fine “unless and until the People prove that [the defendant] has the present ability to pay it.” (*Id.* at pp. 1172–1173.)

We need not determine whether *Dueñas* applies to defendant, because any error in failing to hold an ability to pay hearing was harmless beyond a reasonable doubt. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 [applying harmless beyond a reasonable doubt standard].) The record demonstrates that defendant cannot make a showing that he would be entitled to relief. Defendant was ordered to pay a total of \$420. Even if he makes only the minimum \$12 a month during his incarceration, he will earn a sufficient amount to cover his fines and fees in 35 months. (See *ibid.*) Defendant's 17-year sentence far exceeds the time it will take him to earn these

amounts.² This fact “forecloses a meritorious inability to pay argument.” (*People v. Jones, supra*, at p. 1035.) Accordingly any error under *Dueñas* was harmless beyond a reasonable doubt.

B. Upon Remand, the Trial Court Should Exercise Its Discretion to Determine Whether to Strike the section 667 subdivision (a)(1) enhancement

As the parties agree, the case should be remanded for the trial court to exercise its discretion whether to strike the section 667, subdivision (a)(1) enhancement. “Effective January 1, 2019, recent amendments to sections 667 and 1385 delete language prohibiting a judge from striking a prior serious felony conviction for purposes of eliminating a five-year sentence enhancement. Instead, the court now may exercise discretion to strike a prior serious felony in the interest of justice.” (*People v. Pride* (2019) 31 Cal.App.5th 133, 142.) Because defendant’s case is not yet final, the amendments apply retroactively to defendant. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973.) Accordingly, we remand the matter for the trial court to consider whether to exercise its newly-obtained discretion to strike defendant’s prior felony conviction.

DISPOSITION

The convictions are affirmed. Upon remand, the trial court shall determine whether to strike the section 667,

² Even if the trial court exercises its discretion to strike the five-year section 667, subdivision (a)(1) enhancement, defendant will be incarcerated for 12 years, far longer than the 35 months it would take him to pay his fines and assessments.

subdivision (a)(1) enhancement. If the court strikes the section 667, subdivision (a)(1) enhancement, the court may reconsider the entire sentence. If the court strikes the enhancement, the court shall forward an amended abstract of the modified judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.